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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 82

COLUMBIA PICTURES CORPORATION and COLUMBIA PICTURES OF LOUISIANA, INC.,

Appellants,

against

UNITED STATES OF AMERICA,

Respondents,

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, SCREEN GEMS, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,

Defendants-Appellants.

BRIEF ON BEHALF OF APPELLANTS COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC. (REFERRED TO AS "COLUMBIA")

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Reference to Opinions Below

The opinion of the District Court was handed down June 11, 1946. That opinion appears at pages 3504, *et seq.* of the Record, and is reported officially (*U. S.* v. *Paramount*, 66 Fed. Supp. 323). A supplementary opinion (unreported) was filed on December 31, 1946, and appears at page 3702 of the Record.

Grounds of Jurisdiction

This is an action in equity brought by the United States of America involving the Sherman Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C., Sections 1 & 2). The jurisdiction of this Court to review by direct appeal the judgment entered below is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The decree was entered on December 31, 1946 (R. p. 3694).

The following decisions sustain the jurisdiction of this Court to review the judgment below on direct appeal.

> *U. S.* v. *California Co-operative Canneries*, 279 U. S. 553;
> *Swift & Co.* v. *U. S.*, 276 U. S. 311;
> *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173;
> *U. S.* v. *Bousch & Lomb Optical Co.*, 321 U. S. 707;
> *Interstate Circuit, Inc.* v. *U. S.*, 306 U. S. 208;
> *Paramount Famous-Lasky Corporation* v. *U. S.*, 282 U. S. 30;
> *U. S.* v. *American Tobacco Company*, 221 U. S. 106;
> *U. S.* v. *Reading Company*, 226 U. S. 324;
> *U. S.* v. *National Lead Co.*, 332 U. S. 319;
> *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218.

On February 6, 1947, appellants filed a petition for appeal, assignment of errors and prayer for reversal and citation, and the District Court made an order allowing the appeal upon filing of a bond for $2,000 for costs, which bond was filed.

On April 7, 1947, this Court made an order staying certain sections of the decree pending the determination of the appeal. On May 8th, 1947, the record was filed with the Clerk of this Court, and on May 13, 1947 appellants filed their statement of points relied on and designation of parts of the record necessary for the consideration thereof (R. p. 3830).

On June 23rd, 1947, this Court noted probable jurisdiction (R. p. 3840).

Statement of the Case

1.

Proceedings Below

This suit was commenced by the filing of a summons and complaint on July 30, 1938 against appellants and the remaining defendants, all of whom may be divided into eight groups, five of them being known as the Major defendants and their subsidiaries, which produce, distribute and exhibit pictures (*i.e.* Paramount, Loew, RKO, Warner, and Twentieth Century-Fox), and the remaining three being known as the Minor defendants and their subsidiaries, which either produce and distribute or merely distribute pictures but do *not* exhibit them or own any theatres (*i.e.* Columbia, United Artists, and Universal). These eight groups are the principal producers and distributors of motion pictures in the United States.

The Government claimed a violation of Sections 1 and 2 of the Sherman Anti-Trust Act, charging appellants and the other defendants with having combined and conspired with each other in the production, distribution and exhibition of motion pictures in the United States. Upon the trial the

charge of conspiracy with respect to *production* of pictures was withdrawn by the Government, leaving allegations of restraint only with respect to distribution and exhibition.

The Government alleged that the illegal restraint was brought about by means of:

(1) Franchise agreements, under which by a single contract the defendants granted exhibitors the right to exhibit more than one season's product of pictures;

(2) Pooling arrangements, under which the major defendants pooled their theatres with each other or with third parties;

(3) Block-booking, under which defendants sold all or a portion of a season's product in advance of production;

(4) Preferential run, under which major defendants' theatres were favored with first run exhibitions and obtained a monopoly of the better playing time in their own theatres;

(5) Unreasonable clearance under which the major defendants' theatres obtained more protection over subsequent run theatres than was necessary, as a consequence of which independent theatres were relegated to an inferior and unprofitable position; and

(6) Minimum admission prices under which the defendants compelled independent exhibitors to maintain admission prices, thereby resulting in a favored position to the affiliated theatres.

While complaining of all these practices in the industry and seeking injunctive relief, the plaintiff also demanded that the five major defendants be divested of their theatre

holdings and that they be compelled to confine themselves in the future only to the production and distribution of motion pictures, or only to exhibition.

There were two trials of this case. The first trial was commenced on June 3, 1940, and lasted a week. Before any testimony was taken, however, the parties conferred at the suggestion of District Judge Henry W. Goddard, who presided, and a consent decree was agreed upon between the five Major defendants and the Government, which was filed on November 20, 1940. The three Minor defendants (Columbia, United Artists and Universal) refused to be a party to such consent decree.

Under that decree the consenting defendants agreed to trade-show their pictures and to license them in blocks of no more than five. A system of arbitration was instituted under which exhibitors, complaining of unreasonable clearance, and under certain circumstances, of run, were given an opportunity to arbitrate that question. The decree provided that after three years the Government could, if it so desired, be at liberty to proceed with the trial. Columbia and Universal continued to license their season's product in advance as heretofore. (United Artists, merely acting as an agency for independent producers, has never block-booked).

At the expiration of the three year period the Government decided to continue with the trial. It asked for and obtained an order for an Expediting Court, and Circuit Judge Augustus N. Hand together with District Judges Henry W. Goddard and John Bright, were appointed as such Court and have acted as such ever since.

On October 8th, 1945, the trial of the case was resumed before the Expediting Court. It lasted until November 20, 1945. The Government abandoned any attempt to prove a monopoly in production of motion pictures. In attempting to prove the other allegations of its amended complaint the Government confined itself to the production of statistics, data, and contracts theretofore furnished to it for the most part by the defendants themselves pursuant to interrogatories. It called no witnesses whatever except two Government employes who compiled tabulations. There are approximately 400 exhibits in the case.

Appellants were not involved in the issue of divestiture. They were and are primarily concerned with block-booking and with the freedom to license their pictures without restriction.

On those two issues appellants produced their General Sales Manager, Abraham Montague, who testified at great length as to the propriety of block booking and the manner in which it had originated; that it was an economic necessity for appellants to sell their pictures at the commencement of the season to each exhibitor in block, and, of course, long before they had been produced; that the independent exhibitors throughout the country required and demanded block booking as an economic necessity for maintaining an adequate supply of motion pictures for their theatres; that appellants in dealing with over 10,000 of the 18,000 theatres in the country for over twenty years had acquired a good will and many old and satisfied customers, and that appellants indeed favored their independent customers even as against the theatres affiliated with the five major defendants. Appellants amply proved a long his-

tory of fair dealing and good business relations with their customers among both affiliated and independent exhibitors.

The trial having been concluded on November 20, 1945, briefs were thereafter submitted by the parties in January, 1946.

On June 11, 1946, the District Court handed down its opinion, in which it found each and all of the defendants to have violated the Sherman Act. In effect it held that all of the usages and customs heretofore enumerated and of which the Government complained (including block-booking), were illegal and should be restrained. The Court, however, stated that it felt that divestiture was too drastic a remedy, and refused the Government's plea in that respect. Its opinion is reported in 66 Fed. Supp. 323.

Thereafter appellants, the Government and the other defendants submitted proposed findings and decrees. Appellants submitted thirty-four findings and two conclusions of law (R. pp. 3641-8). Hearings were held by the Court on the proposed findings and decrees and on December 31, 1946, the Court made and filed its Findings of Fact and Conclusions of Law and its Decree. Concurrently with the filing of the Findings and Decree on December 31, 1946, the Court filed a supplementary opinion, a copy of which (unreported) appears at page 3702 of the Record.

The Decree substantially follows the Court's June 1946 opinion. Among other acts, it prohibits the appellants and the other defendants from licensing their pictures in block at the commencement of the season by imposing such restrictions thereon that, as a practical matter, each of appellants' pictures must be licensed one by one as and when

it is produced. It compels appellants to disregard old customers. It sets up a method of regulation under which exhibitors in competitive areas have the right to bid against each other for each of appellants' pictures. Appellants are compelled to accept the highest bidder. These provisions are contained in Paragraphs 7, 8 and 9 of Section II of the decree, and are the provisions which these appellants complain of on appeal and have assigned as error.

Both in its pleading and upon the trial the Government referred to the licensing of pictures in groups or wholesale as a pernicious form of activity. It sought to create an evil by definition alone—a new technique in the trial of cases. After weeks of this atmosphere the District Court fell into the trap, and it also began to speak of this method of selling with bated breath. But nobody thought it necessary to *prove* illegality, and that formality was entirely dispensed with. And so "block-booking" became another violation of the Sherman Act by the Government's *ipse dixit*.

The appellants claimed below that "block booking", as the term is known in the motion picture industry, is nothing more nor less than licensing all or part of a season's product of motion pictures in advance; and that the testimony on the trial showed clearly that there was no "tying-in" of pictures or conditioning the licensing of one picture or one group of pictures upon the licensing of another picture or another group of pictures; that the Government had signally failed to prove any such "tying-in" or conditioning, although a producer and distributor of motion pictures had as much right to sell all or part of his season's product in advance as a manufacturer of shoes or soap; that economical-

ly it was necessary to appellants' existence to operate in that manner, because only by the sale of its product in advance could it be determined how many contracts there would be for each picture to be made and the potential license fees; that such a determination was necessary in order to obtain finances, particularly from banks, for production for the ensuing season; that this practice was similar to the normal practice of wholesalers and manufacturers generally, and that a prohibition against block booking would interfere with appellants' ability to make financial arrangements and might cripple their business.

It was pointed out that in addition to the three minor defendants in this case there were three other distributors of motion pictures of substantial size, to wit: Monogram Pictures Corporation, Republic Pictures Corporation and Producers Releasing Corporation, each of which has been engaged in block-booking. These companies were not parties to this suit nor are they subject to this decree, and therefore they are free of the regulation of block-booking imposed by this decree. Each of these companies is a substantial competitor of appellants and would thereby obtain an economic advantage over appellants, because they would be free to license a season's product at one time, instead of offering pictures one at a time.

Appellants also contended that in addition to this general interference with ordinary business procedure, the attempted regulation of the industry by means of a prohibition against block-booking and the provisions for competitive buying and selling would constitute an illegal interference with plaintiff's copyrights both past and prospective and a taking of its property without due process.

Under the Decree and Findings, appellants' pictures must be put upon the auction block, singly and after production. Appellants are required to sell them to the highest bidder, disregarding their old customers and the good will built up for over twenty-seven years. It was pointed out particularly that this kind of auction selling was a hardship upon the three Minor defendants, who own no theatres, because the five Major defendants owning their own theatres were permitted by the Findings and Decree to license the pictures produced by them to their own theatres without any restriction whatsoever. This places the three Minor defendants, including appellants, at a terrific economic disadvantage. It furthermore destroys the rights given to them by their copyrights.

Appellants strongly emphasized that the Decree was a destruction of copyrights under the guise of an enforcement of the Sherman Act, and that nothing in the Sherman Act warranted the District Court in exercising its jurisdiction in that manner; and appellants directly questioned the jurisdiction of the District Court to make such Decree. (See Appellants' Memoranda at pages 3636 and 3650 of the Record.)

Appellants' arguments were disregarded by the District Court, and the Findings and Decree as filed on December 31, 1946 have embodied those provisions which appellants have assigned as error and to which they object and which they ask this Court to reverse.

2.

Specification of Errors

Specifically appellants assign error to Findings numbered 1, 93, 94, 97, 154, 156, and Conclusions numbered 8(g) and 11 (R. pp. 3659-3694). (Assignment of Errors 1, 2, 3, 4, 5, 6, 7, 8 and 9, at pp. 3752-3762 of the Record.)

The Decree in effect tears this industry apart, and holds illegal practically every custom and usage and every type of contract which has crystallized over a period of thirty years. Appellants have not appealed from the restraints upon pooling agreements, franchise agreements, minimum admission prices, etc., because they feel that they can successfully operate their business in spite of those injunctive provisions. They have appealed, however, from two things: (1) the injunction against block booking, and (2) the imposition of so-called competitive bidding, or as we prefer to call it, the provisions for auction selling. Those two provisions of the Decree, if sustained by this Court, would work incalculable injury upon appellants.

With respect to block booking, we contend that the evidence does not warrant any finding condemning this as an illegal practice. With respect to auction selling, we contend that the District Court has no jurisdiction to include such a provision in its Decree.

We confine ourselves solely to those provisions which are contained in Paragraphs 7, 8 and 9 of Section II of the Decree, and we ask this Court to reverse the decree in that respect, and to strike such provisions from the Decree.

ARGUMENT

POINT I

Block-booking is a lawful practice, and does not violate the Sherman Act.

Findings Nos. 1, 93, 94, 97, 154 and 156, and Conclusions Nos. 8(g) and 11 are unsupported by proof.

[Assignment of Errors 1, 2, 3, 4, 5, 6, 7, 8.]

The Government had imputed some sinister and conspiratorial motive to licensing motion pictures in a group or a season's output, and in its amended and supplemental complaint it alleged this to be a wholly illegal practice. (Amended Supplemental Complaint, pars. 145, 181, R. pp. 3185, 3198.)

When this action was brought all eight defendants as well as other distributors in the trade made it a practice to license their full season's product of pictures or a substantial part of it to exhibitors at the commencement of each licensing year (from June to September). This was usually done by each company by means of a single contract; the pictures were described by title or story or star or director (or all four items), and as and when the pictures were produced and made available for exhibition during the ensuing season they were furnished to the exhibitor. That practice prevailed in the industry for over twenty years and was an economical method of licensing pictures, not only giving an advantage to the distributor, in that he knew at the commencement of the season how many customers he could rely upon, how much he could budget his pictures for,

how much capital he would require, or how much he would have to borrow from the banks, but also giving the exhibitor an assurance of product for the season and relieving him of the worry and labor of constantly seeking product and negotiating therefor. The simplicity of the method is of course obvious.

However, when the consent decree was negotiated between the Government and the five Major defendants in June, 1940, the Government exacted as one condition a provision that henceforth those five Major defendants would license their pictures only in blocks of five as and when they became available (R. p. 3375). This was of course a modified form of block booking. Instead of licensing pictures in a block of say forty pictures, at the commencement of the season, each Major defendant could license no more than five pictures at various times during the season. The Government by entering into the consent decree in November, 1940 obviously placed its stamp of approval upon this modified system of block booking. The difference was merely one of degree.

The appellants and Universal, as well as all other distributors who are not parties to this suit, continued to license their pictures at the beginning of each season in groups or a season's output. From 1940 on the five Major defendants have been licensing their pictures in blocks of five and the Minor defendants and other distributors have been licensing their pictures as theretofore. Upon this trial, however, the Government claimed that *all* methods of block booking were illegal. In view of this change of position it might have been expected that the Government would offer some proof of the alleged illegality of that practice.

But this the Government failed to do. It did not call a single exhibitor or any other witness, nor did it offer in evidence a single document among all of the hundreds of exhibits in this case, which would justify the District Court in making a Finding that block booking as practiced by these appellants and others violated the Sherman Act. There was no proof that any exhibitors had suffered any injury by this practice or that exhibitors were forced to deal in this manner against their will.

Indeed, the exhibitors generally seem to have operated their business with a large measure of success (R. pp. 1305, 1270-1).

To the Major distributors it is perhaps no hardship to market their pictures either singly or five at a time. It is different however with appellants. Economic necessity for licensing a season's product at one time finds its roots in the limited capital of the smaller companies like appellants. In its eagerness to secure a sweeping decree and to revolutionize the industry, the Government brushed aside this important economic consideration, and deliberately turned a deaf ear to the plea of the little fellow.

When we come to a consideration of the evidence on block booking which was offered by appellants and by Universal, we believe that the Court will be convinced that not only was the Government wrong in insisting upon the abolition of that practice, but that block booking was something which the exhibitors themselves wanted. At least "block-booking" has been a protection to them, because they receive an assurance of product and as a result of it know in advance of each season how much they will

have to pay for their pictures. That consideration was likewise ignored by the Government.

Block-Booking Has Had the Legal Sanction of the Courts

Federal Trade Commission v. *Paramount Famous-Lasky Corp.*, 57 Fed. (2d) 152.

The Federal Trade Commission at one time had found block booking to be an unfair method of competition, and had issued an order against defendant Paramount's predecessor to cease and desist from engaging in that practice. The Commission made an application by petition to enforce the order, and the respondent raised the point that it had not been guilty of any violation of law. The Circuit Court of Appeals (2nd Circuit) upheld the respondent and dismissed the petition. (Circuit Judge Augustus N. Hand who was a member of the Expediting District Court, sat on that case.) The court based its decision in part upon a finding that the exhibitor's freedom of choice had not been impaired. The Court found that selling in block did not constitute "tying in" one picture with another and it concluded its opinion with the following statement (p. 159):

> "* * * The means and methods employed in marketing its leases of films to prospective customers are matters within the business judgment of a private producer of films and carries with it the legal right to bargain and negotiate as the respondent did. The method of negotiation which has been condemned by the Commission does not disclose a dangerous tendency unlawfully to hinder competition, nor does it create a monopoly. * * *"

The block-booking contracts of Columbia and Universal were received in evidence in *U. S.* v. *Crescent,* 323 U. S. 173 (to which appellants were a party and dismissed out of the case), so that it was apparent in that case that Columbia's practice as well as the practice of Universal was to sell by block-booking. That practice was not condemned by the District Court or by this Court.

If block-booking was held legal all through these years, what suddenly made it illegal in this case? The record fails to show.

The Government's Failure to Make Proof on Block-Booking

In the early days of the industry the system of selling pictures had been by "state-righters" who were located in key cities in various territories throughout the country. Some had the distribution rights to one state, some to a number of adjacent states. The producer would sell his product to the "state-righter" for the particular territory in which the latter operated (R. pp. 1255-6), and he in turn would license the exhibitor for his own account.

That system proved unprofitable, and failed to give satisfactory revenue to the producer. Abraham Montague, General Sales Manager of Columbia, was himself an exhibitor and later a "state-righter" (R. pp. 1254-5). Speaking from his long experience he testified that Columbia could not operate under that system, and was compelled to open its own distribution exchanges just as the other defendants had been compelled to open their exchanges and distribute by direct contact with the exhibitor (R. pp. 1255-6).

The Government charged that block-booking was combined by Columbia with "blind selling", that invidious

expression being intended to hold block-booking up as an evil practice. It sought to connote that the method fails to give the exhibitor a fair opportunity to ascertain what he is buying, and puts him at a disadvantage.

Nothing could be further from the truth. There is no such thing as "blind selling." That is another one of the Government's definitions which failed to stand up. Montague testified that before his campaign each season he contacted the exhibitors and described as accurately as he could the pictures that Columbia proposed to produce and distribute for the following season. He said that the exhibitors were familiar with his product (as they are no doubt with the product of other companies), and that on their past experience with Columbia they had no hesitation in entering into contracts for the season's product in advance. They were told what stars would appear in a picture, they knew the box office drawing power of the stars, and they were not misled nor kept in the dark as to the quality of the product which they were about to purchase (R. pp. 1257-8, 1274, 1314-6).

Other witnesses testified that pictures are still sold today as they have been for years—on *the star, the story, the director and similar elements* (R. pp. 1177-9).

Trade showing, which was incorporated into the consent decree, proved to be more or less of a farce. The exhibitors did not require it. The best proof of that is that they did not attend these trade showings; the witness Kupper, General Sales Manager for 20th Century-Fox, so testified. He said that he was greatly disappointed in the failure of exhibitors to attend these trade showings (R. pp. 1178-9).

Montague testified that his company needs block-booking because it has to have some assurance of a market in order to hazard its capital in producing many pictures at a substantial cost. *Appellants own no theatres,* and may not look to such source for their market (R. pp. 1258-9). At least, with these exhibition contracts in their possession they may venture spending substantial figures in production (in 1928-1929 they spent $1,632,300, which has been gradually increased, so that in 1944-1945 they were spending an estimated $16,689,700) (C-2).

If Columbia were not able to sell its season's product at one time it could not operate profitably.

Montague stated that block-booking was absolutely vital and necessary to Columbia for its very existence (R. pp. 1258-9):

> "Q. Please state why. A. If we were to change our method of distribution to the so-called small group selling, which is used under the consent decree, we would find it absolutely necessary to change the *whole financial base of our company.* We wouldn't have—we do not have enough *money to keep pictures* in inventory, such as we would have to do, for any period of time. We find it absolutely necessary *to turn our pictures over as rapidly as possible, to send that money back to California so California can again invest it in pictures.*
>
> "Q. Does the making of block contracts or bulk contracts insure a market for your product? A. We feel it does, sir.
>
> "Q. Does it give you something on which you can base the gamble that you take in making pictures? A. It makes more certain the gamble, sir."

Later Montague pointed out that to sell pictures in small groups or blocks would mean keeping pictures on the shelf, delaying their release, and *freezing Columbia's capital;* so that it would require more capital to operate, which Columbia could not readily obtain. He made that very clear (R. p. 1271):

> "Judge Hand: Why do you say block booking is so necessary for you? Is it because you do not own any theatres?
>
> The Witness: Well, it could be one of the reasons, sir, and it is necessary because our type of program is the type of program that runs from the most expensive pictures down to what we call the B grades, the commercial grades of film. We would find it most difficult because of the numbers and the type of quality, and so forth, to continuously go back. We sell so many of these pictures to the small villages and hamlets all throughout the United States who cannot come to the market as often as they would like to. Now, we could not get there fast enough unless we augmented our sales force considerably; *we would not have the money to wait, to hold this inventory on the shelves, so-called inventory, meaning these pictures, on the shelves, while we are waiting to get in there.* Our particular company's success has been on the rapid turnover of its pictures."

The effect of block-booking from the producer's standpoint is that it takes away some of the risk and hazard of production, and enables appellants to venture substantial capital on which at least some return is assured in advance (R. pp. 1258-9).

Appellants sell about 11,000 accounts domestically each year (R. pp. 1266-7). They have their annual sales convention in March or April (R. p. 1267). Montague testified that if appellants had to sell in small blocks he would have to go through with eight or nine campaigns a year at a tremendous increase in expense (R. pp. 1267-8). If compelled to sell picture by picture, there would practically be as many campaigns as pictures.

Manifestly, block-booking is both advantageous and necessary for appellants. However, it is also necessary from the viewpoint of the exhibitors. They want it. It gives them an assurance of product (R. pp. 1258, 1275, 1470). Montague testified that since the consent decree, exhibitors, both affiliated and independent, at conventions at which he, Montague, was present, demanded the restoration of block-booking, and voiced great dissatisfaction with the sale of pictures in blocks of five or less (R. pp. 1275-7, 1297-9).

The witness Rodgers, General Sales Manager of Loew's Inc., testified that since 1940 he had had many bitter complaints from exhibitors because of the sale of pictures in blocks of five or less (R. p. 549).

Appellants' product is used as part of double feature programs, particularly in the larger cities (R. p. 1293). It is obvious that operating on a double feature policy as the great bulk of the exhibitors presently do in the United States, and having need for a large number of pictures, exhibitors are exceedingly anxious to provide themselves with an assured supply; that is one explanation of why the exhibitor desires to buy in large blocks rather than in groups of one, two or three pictures at a time.

The evidence fails to support the Government's allegation that the sale of pictures by so-called block-booking was a violation of the Sherman Act. It does not restrain trade or commerce. It is at least one practicable way in which pictures may be marketed to the mutual satisfaction of both producer and exhibitor. It is the outcome of many years of experiment, of trial and error, and had been working very satisfactorily even after the Government in its consent decree in 1940 insisted on its restriction to five pictures with respect to the Major defendants. The record clearly shows that the new method of selling under the consent decree did not work out to the exhibitors' advantage. The witness, Kupper, testified that he could go back to block-booking (R. p. 1178). The exhibitors seem to be in favor of it (R. pp. 1275-6).

With this proof in the record it can hardly be claimed that the Government proved that block-booking is a pernicious or illegal method of selling pictures, and should be abolished and enjoined. *As a matter of fact, selling in blocks of five or selling in blocks of forty is still block-booking.* Mere numbers do not change the system. If one is illegal, so is the other. Apparently the Government saw no illegality in block-booking when it signed the Consent Decree.

The instant Decree is tantamount to telling a manufacturer or producer that he may not sell his product wholesale or in quantities. It is an indirect method of regulating an industry, which is not the function of a Court sitting in a Sherman Anti-trust suit. From the viewpoint of the exhibitors, some of whom exhibit as many as 400 and 600 pictures a year (R. p. 1275) (and most exhibit at least 200 pictures

a year), it means that each exhibitor is compelled to negotiate a new deal for every picture in his theatre. That would hardly seem to be to his advantage; and insofar as appellants are concerned it imposes a tremendously increased selling cost in sales organization without any corresponding benefit (R. pp. 1267-8, 1271).

A glance at the Government's Exhibit 409, which gives Columbia's net profits for the period from 1934 to 1944, shows how harmful the abolition of block-booking would be to Columbia. Any substantial increase in its selling cost must affect its profits. In 1938 the profits were $183,000; in 1939 the company just about broke even; in 1940 and 1941 the profits were approximately half a million each year. They went up in the three succeeding years because of the unusual war conditions. There is no assurance that they will remain anywhere near that high in the years to come. It is manifest that this company is operating on a modest scale, and cannot afford to be saddled with any extraordinary additional expenses. The abolition of block-booking and the compulsion to sell each picture separately would undoubtedly be a great financial hardship to this company.

As Montague testified, block-booking is still in use by the following companies (R. p. 1258):

Columbia
Universal
Monogram
Republic
Producers Releasing Corporation

Here are five producers with their own national distribution agencies, who sell their pictures in block. All

undoubtedly have the same problems in this connection. To take away from these smaller non-theatre-owning companies the right to sell pictures in block places them at a competitive disadvantage with respect to the larger theatre-owning Majors, and might conceivably result in putting out of business an important portion of the moving picture producing industry, which the Government professes to protect and encourage.

As Montague testified, block-booking is not only a convenient method of selling the product, but at the same time the exhibitor's rights are protected. He is given a liberal right of selection—the right to reject a certain number of pictures (R. p. 1268).

The Government's charge in this respect was most sweeping. *Paragraph 149 of the Amended and Supplemental Complaint* (R. p. 3187) *alleges*, in part:

> "(f) Selectivity of Deals
>
> "In contracting with such a circuit of theatres, each defendant distributor ordinarily gives it the right to select a certain number of the feature pictures released by it each season for exhibition at the circuit's theatres. In contracting with independent theatres, however, each such defendant has ordinarily refused to license any of its product unless the independent exhibitor contracts for all of the features pictures released by it. Or, in the event that independent exhibitors are granted selective privileges in licensing pictures, the selection granted to them has ordinarily not been as great as that granted to competing circuit theatres."

The Government failed to prove that charge.

It appears *without contradiction*, that Columbia gives exhibitors generally the right to reject a substantial part of the product. This is given both to independents as well as to affiliates (R. p. 1268). In fact, "*the independent*" said Montague "*has a little edge on the affiliated.* The affiliated run in the main more important pictures, and we try to be quite a bit more definite on those contracts". (R. p. 1268).

This practice (selectivity) protects the exhibitor against having poor pictures forced upon him. As Montague testified, the extent of the commitment made by the exhibitor is normally related to the amount of available playing time in his theatre. Exhibitors who need a large number of pictures generally commit themselves to a larger percentage of the program, and independent exhibitors who play on first or prior runs and who do not use a large number of pictures naturally have a greater degree of selection (R. pp. 1275-8).

Montague testified that Columbia gives less film rental adjustment to affiliates than to independents, and *indeed gives the independents "all the breaks"* (R. p. 1273). *This is of particular importance in view of the fact that much of Columbia's product is sold to the great mass of theatres in the small towns* (R. p. 1273).

In addition to this contractual protection, exhibitors invariably come around during the season for adjustments (R. p. 1273). They have either been disappointed in the receipts of this or that picture, have failed to make enough money, or feel that they have made too high a commitment

financially for a particular picture. Montague testified that it is his policy to give such exhibitors an adjustment which satisfies and pleases them (R. pp. 1272-4, 1324-5). He said that this was good business for Columbia (R. p. 1273). In fact, this adjustment is almost in the nature of a discount (R. p. 1274); obviously Columbia wants the exhibitors to make money with its product.

Montague testified (R. p. 1272), that on an overall basis and all over the United States the average selectivity on all contracts made by appellants was 32 pictures out of 44.

With this uncontradicted testimony in the record, it is clear that the Government failed to prove Paragraph 149 (f) of its complaint. Yet the District Court proceeded on a contrary basis.

The District Court found (Finding No. 1, R. p. 3659):

> "*Block booking*—the practice of licensing or offering for license one feature or group of features upon condition that the exhibitor shall also license another feature or a group of features released by the distributor during a given period."

There is no proof whatever in this record to justify a finding that Columbia ever engaged in such practice.

There was no proof of "tying-in" or "conditioning" on the part of Columbia. Not a single exhibitor was called to the stand by the Government to give such evidence. Nor did the Government call any other witness for that purpose. Indeed, there wasn't a scintilla of proof that any exhibitor had ever suffered the slightest injury because of block-booking.

Since there was no such proof, we have the right to attack the Findings and Conclusions set out at the head of this Point.

> "The consideration of such a question involves not an issue of fact but one of law which it is the duty of the courts to examine and decide."

Chief Justice White in *Florida East Coast Line* v. *U. S.*, 234 U. S. 167, 185.

The proof was that at the beginning of each season Montague tried to sell as many pictures as he could to each exhibitor.

Montague, appellants' sales manager, testified (R. p. 1259):

> "Q. Tell the Court, please, how large a block of pictures you sell each year, approximately. A. Well, for the last few years it has numbered between 40 and 44 pictures, that we call features; we also sell westerns; we also sell short subjects, and we have serials.
>
> Judge Bright: How many in a block?
>
> The Witness: We try to sell all of the pictures that we have to all exhibitors. It is either all or part thereof.
>
> Judge Goddard: That numbers some 40, you say?
>
> The Witness: So-called features, as we call them, there are between 40 and 44.
>
> Judge Bright: During what period?
>
> The Witness: Between the period of September and October 1st we expect to produce and release that number. Sometimes we fall a little short."

And again at pp. 1271-2:

"Q. Have you ever compelled an exhibitor to take your short pictures in order to obtain your features? A. No, sir.

Judge Goddard: ~~I do not quite~~ understand that. If you tell us that you sell your entire product at one time, that would include shorts and everything else, would it not?

The Witness: We attempt to sell our entire product at one time, but it is only a small percentage of the theatres in the United States that we suceed in doing that. It usually ends up with the exhibitor having a selective contract. He may or may not buy any shorts at all.

Judge Goddard: On an average how many pictures does the contract include, a block?

The Witness: Sir, on our feature program, meaning 44 pictures in that form, which excludes the Westerns, we average about 32 across the United States to an account.

Q. You do not condition the selling of features upon the taking of shorts, do you? A. No, sir.

Q. And if an exhibitor does not want your shorts you will sell him your features just the same? A. Yes, we will try to sell him the shorts; we will use all the salesmanship that we have, if he uses shorts.

Q. But you have never withheld your features from an exhibitor because he would not use your shorts, have you? A. We could not afford to do so, sir."

And at pp. 1274-7:

"Judge Bright: Where you sell a block of pictures to one exhibitor, that is at the beginning of your season, isn't it?

The Witness: Yes.

Judge Bright: They buy blind as to some of them?

The Witness: Yes, sir, we got only a few films produced, he can see. The rest of them are on description, and he really and truly buys on what we call past performance—what has Columbia's past performance been with that exhibitor over the period of years that we trade with him.

Judge Bright: Do you sell to these so-called majors, five majors, by block licenses?

The Witness: We sell them by block, sir.

Judge Hand: Right along?

The Witness: Right along. We have since our beginning and still do, sir.

Judge Goddard: Just the same, same as to the independents?

The Witness: I did not get your question.

Judge Goddard: Are blocks sold comparatively the same size as those sold to the independents?

The Witness: Comparatively. In some of their big theatres we cannot sell as many. In some of the smaller theatres we can sell more because they can use some of what we call our B-grade films. If the theatre is such it does not use B-grade films, of course, we cannot sell them or license the film—that would be a better expression.

Judge Hand: If I understand the thing at all, to sell to an exhibitor a lot of 40 plays would be a perfect gamble as far as he is concerned as to half of the plays submitted?

The Witness: Well, sir, from your seat I can understand that you could think so, but a lot of these exhibitors would like not only to buy 44 but they would like to buy 84, if we have them, because they need the film. They are changing in these towns—

some of them use as many as six, and some eight and 12 pictures a week, if they have a double bill. They need these pictures. If you try to take them away and give them to somebody else in that town, you see the squawk they put up, because they feel that is their measure of protection and they want it.

Judge Hand: That is because, I suppose, then, that they have so many different theatres they can place them. Supposing, for example, Paramount or Loew or Fox or any of these defendants, had but one theatre, one big theatre. They certainly wouldn't do it then unless they went into an absolutely blind gamble, would they?

The Witness: They wouldn't do it unless they needed the films that I had to offer. If they only had one theatre in a situation and they played only 52 pictures a week, I wouldn't have a chance, sir, to get in my group of pictures.

Judge Goddard: 52 a year?

The Witness: 52 a year. Pardon me. Correction. Thank you.

Judge Bright: You mean these men that want the block buying most are those that change their program oftenest?

The Witness: Yes. I think they want them most, probably, but the larger exhibitor needs it just as bad as the small one. He wants to know, because of competition, what pictures he is getting. At least we find it so from our own distribution. We have no trouble at all in distributing through block selling. In fact, we have attended meetings back there sometime ago where the exhibitors as a whole were meeting from all over the country, trying to get all these companies to plead—to get away from this so-called small group selling. They wanted to buy all; they wanted to buy their season's product from all the companies. They called them the umpty (sic)

meetings at the time. I have forgotten just what umpty stood for, but it was a whole series of meetings, whereby they actually made a very strenuous plea—

Judge Bright: Exhibitors?

The Witness: Yes, sir. (Continuing) —to do away with this consent decree form of selling.

Mr. Wright: I think he means independent exhibitors, is that right?

The Witness: Independent exhibitors were there, and also affiliated, Mr. Wright.

Judge Bright: That demand or suggestion, you say, comes from the small town exhibitor more than the large one?

The Witness: It would come from small towns, and it would come from large ones, depending on the need of the film to the exhibitor, whether he had a competitor, whether he had a double feature policy, whether he had a single feature policy, whether he run three shows a week, changed three times a week, or whether he changed seven times a week. There are so many things that come into the individual situation as to why that particular exhibitor wants to buy that particular way."

And on cross-examination he testified (at pp. 1313-4):

"Q. And I say in the course of those conversations and negotiations it is sometimes suggested to the exhibitor, is it not, either directly or indirectly, that if he wants to buy certain of the product it would be advisable for him to buy some of the other which may not appear to him to be so desirable, because he may not have such an acute need for it; is that right? A. That is quite true. The exhibitor may want to buy less and we may want to sell more. He may want to buy just two or three pictures of the

top, and we may think he has room in his theatre and we are seeking representation for more.

Judge Goddard: Suppose he says he won't take more than three or four, do you turn him down altogether?

The Witness: In some cases, yes, sir. It would depend on whether we had opposition or not. If we had some place that we thought we could do better by going across the street or in the adjacent town, or some place, the chances are we would go and try to sell that one, or more of it to the other fellow. If we did not have any opposition we would still try to talk him up to take some more film than just the top, because we would not afford to sell him just the top film.

Judge Goddard: Suppose you had none who would take them, and he would not take more than seven, or four or five, would he get them or not?

The Witness: In rare cases, yes. In general cases I would say no, sir."

Montague's attempt to sell each exhibitor as many pictures as possible at the beginning of each season has now been tortured into a "tying-in" or conditioning.

In *U. S.* v. *U. S. Gypsum Company*, 67 Fed. Supp. 397 (appeal argued in this Court November 13-14, 1947), Mr. Justice Stephens, in speaking for the District Court of the District of Columbia which dismissed a complaint of the Government in a Sherman anti-trust suit, said at pages 448-449:

"The basis for injunctive relief under Section 4 of the Sherman Act must be definitely and satisfactorily proved by the Government. * * * It has been repeatedly held in suits brought under this stat-

ute that there must be a definite factual showing of illegality in the conspiracy, combination, or monopoly charged. (Citing cases.) We hold that this properly includes, in the instant case, the duty of proof, by the Government, of the allegations of paragraph 46 of the complaint as well as of all other allegations of the complaint which are in aid of said paragraph. * * *"

And at p. 451:

"By substantial evidence is meant more than a mere scintilla; it must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (Citing cases.) In the Federal courts substantial evidence rather than a mere scintilla is necessary to support a judgment."

See also:

Johnson v. J. H. Yost Lumber Co., 117 Fed. (2) 53, 61.

The record is barren of any proof to sustain Findings No. 1, 93, 94, 97, 154, 156 or Conclusions No. 8 and 11.

From the total lack of proof to support the District Court's aforesaid Findings and Conclusions it becomes clear that the Court's Findings on block-booking were made solely *to enable it to provide for the auction selling method of licensing pictures.*

The District Court could not make such a provision for auction selling and still leave block-booking as a lawful practice, because those two methods of selling are completely

inconsistent. It was obviously mandatory to do away with block-booking, if pictures were to be sold on the auction block; and that explains the presence of these unsupported Findings and Conclusions.

The auction block method of selling and the system of regulation implicit therein were apparently the ultimate aim of the District Court. To reach that objective it brushed aside block-booking as an illegal practice without the slightest proof of illegality.

There is Nothing Illegal *per se* About "Tying-in" or Conditioning the License of a Number of Copyrighted Works Upon the Taking of a License for Other Copyrighted Works.

While there was no proof here that there was any "tying-in" or conditioning by appellants (and we claim that there was none), the District Court held that block-booking *per se* was an illegal practice because in essence it amounted to a "tying-in" or conditioning.

We challenge the existence or legality of any such doctrine.

The District Court manifestly relied on cases such as *Morton Salt Company* v. *Suppiger*, 314 U. S. 488; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27; *Leitch* v. *Barber Co.*, 302 U. S. 458; *Motion Picture Patent Co.* v. *Universal*, 243 U. S. 502; and *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661 (Opinion, R. p. 3543). But those cases held that the owner of a patent could not exploit an *unpatented* article with his patented article because by doing so he was enlarging his monopoly. The District Court posed an imaginary situation where the copyright

owner who had licensed the printing of his book only in connection with paper supplied by him, would come within those cases (R. p. 3543). That might be true. But it is nonexistent here. We have no books and we have no paper.

The District Court, perhaps realizing that the aforementioned cases might have no application, proceeded to place great reliance upon a statement of the late Justice Stone in *Ethyl Gas Corp.* v. *U. S.*, 309 U. S. 436, 459, and particularly that part of it reading as follows (Opinion, R. p. 3545):

> "The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another * * * than for the exploitation of an unpatented article."

It overlooked the important fact, however, that the groups of patents which were being licensed in the *Ethyl Gas* case and in *Standard Sanitary Manufacturing Company* v. *U. S.*, 226 U. S. 20 (cited therein), were being directly used in the exploitation of a monopoly and for the purpose of suppressing trade and commerce. It was the unity of those patents which there gave strength to the defendants and permitted them to accomplish a premeditated unlawful result.

In every sale of property there is of course an element of restraint of trade. In the licensing of one picture alone there is some restraint of trade. Chief Justice Hughes in *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, said (p. 360):

> "* * * Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate

> competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.' "

But here we have appellants offering their separate copyrights in a season's product or less, when there is no conspiracy involved to restrain trade and commerce; where there is no monopoly or attempt to monopolize;* when they are acting alone, dealing at arm's length with each one of 11,000 licenses (as these appellants do); when it is simply done for convenience and economy, and even, if you please, for the purpose of helping the sales of their less important pictures. (In the eyes of the Government and the District Court that was a heinous crime.)

The argument may be advanced that it would be a great hardship to an exhibitor if appellants, for example, came to him and said, "You must take our entire season's product or nothing." The answer to that is that in this record there is no evidence of any such action on the part of appellants. Montague's testimony clearly shows that he tried

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* In its opinion the District Court said (R. p. 3555):

> "The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in no wise approximates a monopoly of film exhibition."

This of course applies as well to the pictures of the three minor defendants. Columbia, for example, produced 41 features and Westerns in the 1943-44 Season, or 10.32% of the total of such pictures produced by all eight defendants that year (R. p. 3555). On the question of monopoly this Court has held that the size and extent of a business may be considered. *U. S.* v. *Eastman Kodak,* 255 U. S. 578.

to sell as many of his pictures as he could; and if an exhibitor did not want all he could take less. There is no proof in this record that a single exhibitor in the United States ever suffered loss or damage by the manner in which appellants' licensed their product.

The District Court said that it may be argued that the common law gives a right to condition the licensing of one film upon the acceptance of another (Opinion, R. p. 3544). If that be so, then that common-law right may only be abrogated by a statute. (Second Employers Liability Cases, 223 U. S. 1, 50), and there is nothing in the Copyright Law or any other statute which takes away that right. Moreover it seems to us that this right of conditioning is a right which is given to every owner of a chattel. For example a jobber of hosiery may decline to sell one dozen pair of hose to a retailer, and he may say, "You will have to take an entire gross. I will not break up my lot. You cannot pick the cream, and leave the less desirable hose on my hands." Every merchant has the right to tie-in and condition his merchandise and sell it as is most convenient and economical to him.

But that is exactly what this Decree has done. It has placed the owners of literary property upon a lower footing than the owners of merchandise and manufactured goods. Not only does this Decree destroy the monopoly given by the copyright statutes, but it reduces the literary property in appellants' films to a form far below that of a chattel. The very incidents of the ownership of property of all kinds—the right to sell, mortgage, transfer, and license, upon the owners terms—is taken away from these copyright proprietors by the arbitrary provisions of this

Decree. Far from enjoying the statutory monopoly which the Copyright Act gives them, these proprietors may not even enjoy the very rudimentary and elementary incidents of ownership of property which is enjoyed by everyone else in the land in his own property, real or personal.

Since when does the creator of a literary work lose that right when he obtains a copyright? Is that one of the common-law incidents of ownership which he must give up to acquire the statutory monopoly? We have yet to find any precedent which holds that way.

It is that very reasoning, however, which motivated the District Court to hold that "tying-in" or conditioning of separate copyrights was illegal. But a different situation is presented here. This Court indeed has recognized the distinction and commented upon it only recently in *Transparent-Wrap Machine Corp.* v. *Stokes & Smith*, 91 Law. Ed. 451, which involved a patent on a machine for the packaging of candy, and a license agreement under which the Licensee undertook to assign improvement patents to the Licensor.

The Court held that the license agreement was not *per se* illegal, and that it did not come within the doctrine of the *Morton Salt* case and similar cases. At page 455:

> "An improvement patent, like the basic-patent to which it relates, is a legalized monopoly for a limited period. The law permits both to be bought and sold. One who uses one patent to acquire another is not extending his patent monopoly to articles governed by the general law and as respects which neither monopolies nor restraints of trade are sanctioned. He is indeed using one legalized monopoly to acquire another legalized monopoly."

Judge Bright, who was a member of the Expediting District Court, quite recently himself upheld the validity of transactions in which a patentee, both of the product and of the method, compelled a licensee who purchased the patented article to avail himself of the patented method; and he held that this was not an extension of the monopoly granted by the patent on the article. *Libbey-Owens-Ford Glass Co. v. Sylvania*, 64 Fed. Supp. 516, affd. 154 Fed. (2d) 814. The following part of the opinion of the Circuit Court of Appeals is significant (p. 815):

> "It has both product and method claims, covering a molding composition, or powder, made and sold by plaintiff, which, upon the application of heat and pressure according to the methods stated, may be shaped and hardened into plastic articles. Purchasers of the composition receive an implied license to use the process, while the grant of licenses under the method claim (of which two are now outstanding) is confined to those persons who purchase the composition. The legal claim is that this extends the monopoly of the method claim beyond its scope and to the products made by the process; and there is cited the well-known series of cases culminating in Mercoid Corp. v. Mid-Continent Inv. Co., 320 U. S. 661, 64 S. Ct. 268, 88 L. Ed. 376, that the monopoly of a patent cannot be pressed to include an unpatented article. But Judge Bright, below, following Judge Leibell in General Electric Co. v. Hygrade Sylvania Corp., D. C. S. D. N. Y., 61 F. Supp. 531, did not see how this doctrine could apply, because the product itself was patented and there was no extension of the patent beyond what the patent grants."

Licensing in bulk is an ancient and respected practice in the entire entertainment field with respect to copyrights. Following are a few examples:

(a) Somerset Maugham has written many short stories which appeared originally in various magazines, and on which separate copyrights were obtained. His publishers recently published a volume of those short stories. If we want to read one of the stories and are unable to obtain it because the old magazines are either out of print or unavailable, we must purchase the entire volume in which the particular story appears.

(b) Phonograph records usually contain two different copyrighted compositions, one on each side. The purchaser may only want the composition on one side of the record. He is nevertheless compelled to pay for the cost of the preparation of both compositions, including the compulsory license fee.

(c) The members of the original cast in "Oklahoma", a very successful dramatical musical work, gave their services to a record company and reproduced ten of the leading musical compositions in that play. These compositions appear on both sides of five records. If we desire to purchase a record containing one of those compositions as sung by the original member of the cast, we cannot do so because the record company sells those records only in an album of five records; we must pay for the full album in order to obtain that one composition.

(d) Music publishers for generations have published folios in which separate copyrighted compositions appeared, frequently the collected works of a single composer.

Many of those compositions have been out of print for years and are unobtainable in any form except through the purchase of the folio.

(e) Book publishers compile sets of famous authors' works. Because they are out of print, it is often impossible to buy single volumes of the novels of authors who have been dead for forty years or more but whose copyrights are still valid. (Twenty-eight years plus a renewal of twenty-eight years). If we want to buy a novel of Richard Harding Davis or Rudyard Kipling, in all likelihood we will have to buy the entire set in which such novel appears.

(f) Motion picture exhibitors themselves sell to the public in package and block. The great majority of theatres throughout the country have double features, and usually each picture is produced and copyrighted by a different company. In addition to this they have as a rule a newsreel and a "short," also owned and copyrighted by different companies. For each one of these pictures the exhibitor has to pay a rental. This expense is figured in the price of admission. But the public has to pay the admission price so figured, even though many of them might want to see only one of the pictures. Indeed, an attempted restriction on the right to show double-features has been held to be restraint of trade.

Vitagraph, Inc. v. *Perelman*, 95 Fed. (2) 142.

If the so-called "tying-in" or conditioning implicit in the District Court's definition of block-booking is illegal, then each and every one of the practices referred to in the illustrations given above is illegal.

The Copyright Act nowhere provides that the proprietor of the work must vend, arrange, publish, etc. his work singly. No restriction is placed upon him. Congress certainly must have contemplated that many copyrighted works would be created and owned by one man (an author) and that many copyrighted works would be acquired by one man, such as a publisher. With that in mind Congress could have made an attempt to forbid the exploitation of those works in bulk, or package deals, or in block. But it did not do so. The Congressional intent is to give to the copyright proprietor the utmost freedom in the exploitation of his works. Appellants therefore, if they wished, had a right to unite their separate copyrighted works and license them in bulk. As long as appellants exercised no monopoly, or made no attempt to restrain trade, they could "tie-in" or condition their pictures to their heart's content, that being one of the incidents of their respective copyright monopolies. They could condition the licensing of one picture or group of pictures upon the licensing of another picture or group of pictures.

> "He * * * may annex various conditions upon which the possession shall be held." (Curtis on Copyright, p. 5).

To deprive appellants of that right is to deprive them of their statutory and constitutional monopoly, as this Decree has done.

POINT II

The Court below was without jurisdiction to regulate or prescribe the manner in which appellants may license their pictures for exhibition. For all practical purposes appellants are required to put their pictures upon the auction block. That is not the function, nor is it within the power, of an equity court sitting in a Sherman anti-trust suit.

[Those provisions are contained in Paragraphs 8 and 9 of Section II of the Decree (R. pp. 3696-8).]

[Assignment of Errors 9.]

The Sherman Act does not provide for regulation of industry by imposing new and untried methods and devices for licensing copyrighted works.

The Act has a self-imposed limitation. (15 U. S. C.): (Italics ours)

> "§4. Jurisdiction of courts; duty of district attorneys; procedure:
>
> "The several district courts of the United States are invested with jurisdiction to *prevent* and *restrain* violations of sections 1-7 and 15 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to *prevent* and *restrain* such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be *enjoined* or otherwise *prohibited*. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hear-

ing and determination of the case; and pending such petition and before final decree, the court may at any time make such *temporary restraing order* or *prohibition* as shall be deemed just in the premises. July 2, 1890, c. 647 § 4, 26 Stat. 209 Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167."

Federal courts are courts of limited jurisdiction and have only such powers as are expressly conferred upon them by statute. There is no presumption of jurisdiction; on the contrary, it is lack of jurisdiction which is presumed. In *Danks* v. *Gordon*, 272 Fed. 821 (p. 823):

> "The jurisdiction and powers of federal courts are derived from the Constitution and the acts of Congress. They possess only such powers as have been conferred upon them. In an action in such courts it is presumed that the court is without jurisdiction until the contrary affirmatively appears."

The District Court, therefore, was strictly bound by the express limitations of Section 4 of the Sherman Act to "prevent" and "restrain".

The want of power of a court of equity to regulate business was ably commented upon in *Daniels et al.* v. *Portland Gold Mining Co. et al.*, 202 Fed. 637 (1912; cert. den. 229 U. S. 611).

In that case suit was brought by three mining companies on behalf of themselves and others similarly situated, to enjoin a number of persons from operating assay offices and purchasing ore. The complaint alleged that gold ore was being systematically stolen in small quantities but of large aggregate from the neighboring mines and that

this criminal practice was encouraged and facilitated by defendants, who conducted an assay office where they received and purchased the stolen property. Plaintiffs sought a decree enjoining defendants from conducting assay offices or from purchasing or receiving ore from any person in the mining district.

The trial court granted an injunction restraining defendants from purchasing ore from mines in the District without first notifying the superintendent of one of the three companies bringing the suit of the fact that the ore had been offered for sale, and giving the name of the person who offered it, the name of the mine from which it purported to come, the owner thereof, the number of pounds, and a statement that its original condition, when first offered, had not been altered. It further provided that if either of the superintendents of the mining companies should, within twenty-four hours after receipt of such notice, advise the person furnishing the same that the ore had been stolen, then that defendant must hold it for forty-eight hours before purchasing it or agreeing to do so, and defendants and each of them were enjoined from dealing in ore of any kind or description, except under the foregoing conditions and restrictions. On appeal this decree was reversed on the ground that it constituted a usurpation of legislative power. At page 639 Judge Hook said:

> "We think the injunction was an inadmissible exercise of the judicial power. Consistently with the fullest recognition of the progressive and flexible character of equity jurisprudence and its continuing adaptability to the increasing magnitude and complexity of modern affairs, care must nevertheless be taken not to transgress its fundamental limita-

tions. Though the writ of injunction may be properly employed to protect rights of property, however great or small, complicated or simple, it should not be made a vehicle for invading the legitimate legislative province of government or a means of establishing a system of rules for the regulation of the business of a community."

Holding that it was not the function of a court of equity to regulate and supervise a business, Judge Hook further said at page 641:

"Ordinary business callings may be attended by conditions, or may offer temptations that threaten the public welfare or the lives, health, morals, or property of those who come in contact with them. There is a stage at which the state will take cognizance and prescribe rules and regulations to prevent or lessen the evil. If the evil is deemed greater than the good, the calling may be wholly prohibited; if less, regulated. But, whatever course is taken, it is the exercise of the police power of the state, of which a multitude of illustrations may be found in the statute books, *and its expression as a rule of conduct is a legislative function.* Thus in many states the business of bucket shops and ticket scalpers is prohibited, and in Colorado there is a statute regulating the business of assayers and designed to prevent the very practice complained of here. *Legislative regulations may be inadequate, but a court in a suit between private parties must act within much narrower lines and cannot make others.*"

The case of *United States v. New York Coffee and Sugar Exchange, Inc.*, 263 U. S. 611 (1924), which is to a similar effect, arose under the Anti-Trust Laws. In that case the Government sought to enjoin the Exchange from engaging

in certain practices alleged to be monopolistic. In affirming the decree dismissing the suit, Chief Justice Taft held that no infraction of the Anti-Trust Laws had been made out. Concluding his opinion, the Chief Justice pointed out that it was not a judicial function to impose rules and regulations for the conduct of a business, saying at page 621:

> "The Government in effect asks this Court to enforce rules and regulations for the conduct of the Sugar Exchange which shall prevent the future abuse of its lawful functions. *This is legislative and beyond our power.*"

Likewise, in *A. T. & S. Railroad* v. *D. & N. O. Railroad*, 110 U. S. 667 (1884), the Court expressly held that it was the function of the legislature and not of the courts to regulate and supervise the conduct of business affairs. In that case the D. & N. O. Railroad brought a suit in equity to compel the A. T. & S. Railroad to unite with it in forming a through line of railroad transportation to and from Denver, with all the privileges which the A. T. & S. Railroad might grant to any other company owning and operating the railroad between Denver and Pueblo. The Circuit Court entered a decree requiring the A. T. & S. to stop all its passenger trains at the platform built by the D. & N. O. Railroad, where the two roads joined, and to remain there to take on and let off passengers and to receive and deliver express matter and mails. It also required the A. T. & S. to keep an agent there, to sell tickets, check baggage and bill freight. Freight trains were to be stopped at the same place whenever there was freight to be taken on or delivered. The A. T. & S. was required to carry freight and passengers going to or coming from the D. & N. O., at the

same price it would receive if the passenger or freight were carried to or from the same point on a through ticket or through bill of lading issued by any competitor of the D. & N. O. In short, the decree established in detail rules and regulations for the working of the A. T. & S. and D. & N. O. roads.

In reversing the decree, Chief Justice Waite pointed out that the Court had made an arrangement for the business intercourse of the companies such as, in its opinion, they ought in law to have made for themselves (675). He further said at page 682:

> "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

and added at page 686:

> "The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy."

That the Court must restrict its relief to injunction has been repeatedly emphasized.

In *Hartford-Empire Company* v. *U. S.* 323 U. S. 386, this Court said (pp. 409-10):

> "But, even so, the court may not create, as to the defendants, new duties, prescription of which

is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested.''

In a case where this Court sought to apply the most stringent remedies, it nevertheless realized the limitations of the Statute. (*Standard Oil* v. *U. S.*, 221 U. S. 1, at p. 77):

"* * * it may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift* v. *United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalities which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2nd. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.''

But even there this Court did not grant relief other than by way of injunction and dissolution.

In *U. S.* v. *Reading Co.*, 226 U. S. 324 (1912) the Court, by Mr. Justice Lurton stated (p. 369):

> "It is, of course, obvious that the law may not *compel* competition between these independent coal operators and the defendants, but it may at least remove illegal barriers resulting from illegal agreements which will make such competition impracticable."

In that same case (183 Fed. 427) Circuit Judge Gray in the District Court had stated (p. 459):

> "The injunction or restraining order specifically prayed for in the petition should be granted, so far as it will serve 'to prevent and restrain' the future or continuing violation of the act. *This is the only jurisdiction conferred upon the court in such a proceeding as the one before us,* and there can be no injunctive relief granted, unless it tends to restrain some specific future or continuing violation of the act."

In the language of Judge Goodrich in *U. S.* v. *Pullman Company,* 64 Fed. Supp. 108, at p. 110:

> "We take it that the judgment of a court under the Sherman law is not to substitute the judicial judgment for that of the proprietors of the country's business enterprises."

The instant Decree goes so far as to compel appellants to disregard their old customers, and thus wipe out their good will. (Sec. II, Paragraph 8(b), R. p. 3697). This is not the function of the Sherman Act. In *Camfield Mfg. Co.* v. *McGraw Elec. Co.,* 70 Fed. Supp. 477, Judge Leahy hold-

ing insufficient in law allegations of boycott in a complaint said (p. 481):

"*The complaint simply is defendant will not do business with plaintiff's distributors. In general, it seems a necessary part of our business mores for a manufacturer to have free selection in dealing with its distributors.* Upon the recognition of this fact, why may he not refuse to do business with one who deals in a closely *competitive product?* Looking at the reality of our economy, I have never seen *a distributor of Ford automobiles, for example, also distribute a car of another competitor within the same price range, such as the Chevrolet; nor does McKesson & Robbins distribute the drug supplies of Park-Davis; etc. It has been said* (under circumstances which have exceptions) *the anti-trust laws do not restrict the right of a manufacturer freely to exercise its own judgment as to the parties with whom it shall deal. U. S.* v. *Colgate,* 250 U. S. 300, 307; *U. S.* v. *Parker Rustproof Co.,* 61 F. Supp. 805, 812." (Italics ours.)

This Court has frequently reiterated that doctrine. In *Fed. Trade Comm.* v. *Raymond,* 263 U. S. 565, 573:

"It is the right, 'long-recognized', of a trader engaged in an entirely private business, 'freely to exercise his own independent discretion as to parties with whom he will deal.' (Citing cases.) Thus a retail dealer 'has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself.' *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600, 614; *United States* v. *Colgate & Co., supra,* p. 307. He may lawfully make a fixed rule of conduct not to buy from a producer or manu-

facturer who sells to consumers in competition with himself. *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 440. Or he may stop dealing with a wholesaler who he thinks is acting unfairly in trying to undermine his trade. *Eastern States Lumber Assn.* v. *United States, supra*, p. 614; *United States* v. *Colgate & Co., supra*, p. 307. Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for reasons sufficient to himself.' And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain."

In *U. S.* v. *Bausch & Lomb Company*, 321 U. S. 707, Mr. Justice Reed said, at p. 728:

"* * * In a business, such as Soft-Lite, which deals in a speciality of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District Court apparently was, loath to deny to Soft-Lite this privilege of selection. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307; *Federal Trade Comm'n* v. *Raymond Co.*, 263 U. S. 565, 573."

And only quite recently Judge Knight applied that rule in *U. S.* v. *Schine*, 31 Fed. Supp. 270, 274, where he found for the Government in an anti-trust suit.

The Decree Here Involved Strikingly Resembles a Code for the Regulation of the Motion Picture Industry.

Such regulation can only be accomplished through the Legislative branch of the government. If, as was held in *Schechter Corp.* v. *United States*, 295 U. S. 495, at pp. 537-538, the Legislature may not confer upon the Executive the power to regulate industry, certainly the Judiciary cannot usurp such power.

> "It is Congress, and not the Judicial Department, to which the Constitution has given power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject."
>
> *Transportation Company* v. *Parkersburg*, 107 U. S. 691, 701.

Perhaps mindful of this limitation, the Court below purports to decree the sale of pictures by the auction block plan in the *form* of an injunction. The Decree states in the opening paragraph of Section II (R. p. 3695).

> "Each of the defendant distributors * * * is hereby enjoined * * *"

Then follow nine paragraphs, the eighth of which reads as follows:

> "8. From licensing in the future any feature for exhibition in any theatre not its own in any manner except the following * * *"

then come the affirmative regulatory provisions contained in (a), (b), (c), (d) and (e), and in paragraph 9.

This is merely doing lip service to so-called injunctive relief. These are affirmative provisions for a specific and exclusive method of selling pictures—a method which has never been tried before. To argue that these provisions are merely an extension of the injunctive process of the Court is to play upon words.

Appellants Are Placed at a Competitive Disadvantage By This System

The practical aspects of competitive bidding may also be questioned. Who is to determine which of a group of bids represents the *highest responsible one*? No two exhibitors are likely to make the same bid as to dates, clearance, method of fixing rental, etc. May bids containing such diverse factors be readily compared? May a flat rental bid be compared with a percentage bid? May the value of any percentage bid be determined unless the admission price is fixed by the license? If these decisions are left entirely to the distributor, the situation will be no different than at present.

Opposition of exhibitors to the bidding system has been unanimous. In order to assure product for continuous operation, the exhibitor will have to make bids on many more features than he needs. If he bids on just one film, and his competitor outbids him, he is without film. If he bids on two or three, and is successful in all, he has more film than he can use. Moreover, he will not be able to arrange his program to vary the type of entertainment offered. He will find it necessary to take what he can get.

There is a limit to what any theatre may bid for a feature without raising its admission price. Size, location,

and present theatre-going habits will play a large part in determining what each theatre can afford. Exhibitors may find they must make the choice between raising prices in order to obtain a better position or accepting the later runs and poorer films. Neither possibility guarantees any advantage to the public.

Appellants Have Built Up a Substantial Good Will Among Independent Exhibitors. This is Destroyed at One Blow.

Appellants have been in business since 1920. They own no theatres. Their good will consists of 11,000 satisfied exhibitor-customers, a great many of whom are independents, having no affiliation whatever with the Major defendants.

The history of appellants' dealings is that they made it a practice to sell to these independent exhibitors and away from the affiliated exhibitors even at a substantial loss of rental. The Government's as well as appellant's exhibits, substantiate this statement. A brief analysis of both groups of exhibits follows:

The Government took the 92 cities in the United States which have a population of 100,000 or over, and presented data with respect to the period from 1936-37 (the year before this action was commenced) down to 1943-44 (the year before which this action was tried). With respect to the 1943-44 season, the Government put in evidence (Gov. Ex. 428) a master chart showing to whom each particular defendant licensed its pictures in those cities on first run, indicating also whether the pictures were licensed to an

independent exhibitor or to an affiliated exhibitor, and if the exhibitor was affiliated, the particular defendant with which such affiliation was made.

A similar chart was put in evidence by the Government with respect to the approximately 300 cities with populations of 25,000 up to 100,000 (Gov. Ex. 432). That chart indicated, first, those cities in which all of the defendant's pictures were licensed on first run to independent theatres, and, secondly, those cities in which all of defendant's pictures were licensed on first run to affiliated theatres. Thirdly, in the remaining cities where the product was licensed in part to independents and in part to affiliates, the chart indicated which product was licensed to these respective groups of theatres.

Columbia put in evidence a comprehensive tabulation, which lists for each and every season beginning with the 1936-37 season up to and including the 1944-45 season, its regular first run accounts in each of the approximately 400 cities with populations of 25,000 or more (C-6).* Since this chart (C-6) reflects both the 92 cities over 100,000 in population and the remaining 300 odd cities over 25,000 population, it should be read in conjunction with C-7 and C-8 (the colored charts) which indicate the regular first run independent accounts and affiliated accounts in those two groups of cities respectively for that entire nine year period. What do these charts show, both Government and Columbia exhibits? We shall consider each group of cities

* Columbia exhibits are referred to as "C" followed by numbers.

separately, always bearing in mind that the affiliated theatres as a general rule are the largest, most modern and best located in their respective cities.

The 92 Cities

Exhibit C-7 shows that during the above period Columbia sold its regular first run accounts to independent and affiliated exhibitors in the following proportions:

Season	*Independents*	*Affiliated*
1936-37	38½	53½
1937-38	37	55
1938-39	37	55
1939-40	37	55
1940-41	36½	55½
1941-42	37	55
1942-43	37	55
1943-44	36	56
1944-45	36	56

(The fraction indicates a split of the product.)

The foregoing is simply a numerical comparison of the number of independent first run accounts as compared with the number of affiliated first run accounts. The true significance of these figures, however, must be read in connection with the *competitive* situations in these 92 cities.

Government's Exhibit 428 indicates that one or more of the Major defendants in this case operate theatres on first run in 88 of these 92 cities. That chart also indicates that all of the first run theatres in 40 of these cities are operated by the Major defendants, and that all first run

theatres in 4 other cities are operated by independent exhibitors. This means that out of the 92 cities, 48 contain theatres operated on first run both by affiliates and independents.

For the 1943-44 season (a comparison of the exhibits will indicate that said season is typical of other seasons) Columbia licensed its pictures in these 48 cities (where independents and affiliates operated) as follows:

30 cities to independents
16 cities to affiliates
2 cities split between the independent and the affiliates.

In other words, out of the 48 competitive situations Columbia licenses its products to 32 independents, or a percentage of 66⅔%.

And out of the entire 92 cities Columbia licenses its product to 36 independents, or a percentage of 39%.

Let us give a brief analysis of the theatre situations in those 32 cities where Columbia licenses its pictures to an independent who is in competition with an affiliate. The names of the Major defendant-owned exhibitors who operated first run theatres in competition with Columbia's independent accounts in each of these cities are as follows:

Affiliated Opposition in Cities Where Columbia Sells to Independents

City	*Competing first-run theatres and their affiliated ownership*
New York City	Loew's, Paramount, RKO, Warner, Fox
Pittsburgh	Loew's, Warner
San Francisco	Loew's, Fox, Paramount, RKO
Buffalo	Loew's, Paramount
Seattle	Fox
Oakland	Fox
Atlanta	Paramount, Loew's
Birmingham	Paramount
Oklahoma City	Paramount, Warner
San Diego	Fox
Richmond	Loew's
Miami	Paramount
Youngstown	Warner
Hartford	Warner, Paramount, Loew's
Long Beach	Fox
Springfield	Warner, Loew's, Paramount
Norfolk	Loew's
Reading	Warner, Loew's
Sacramento	Fox
Utica	Warner
Duluth	Paramount
Baltimore	Warner, Loew's
St. Louis	Loew's (50% split)
Toledo	Paramount, Loew's
Akron	Warner, Loew's
Kansas City, Kansas	Fox
Cambridge, Mass.	Paramount (50% split)
Gary, Ind.	Paramount
New Bedford	Paramount
Canton	Loew's
Somerville	Paramount
Erie	Warner

It is to be noted that not only does Columbia sell away from one affiliate in many of those cities, but in some cities it sells away from a number of affiliates.

Exhibit C-10 indicates that in three cities where Columbia previously sold to one affiliated exhibitor it now sells to another.

Not only that, but in *twelve* cities Columbia at one time or another left its first run affiliate account and switched to an independent for its first run account.

The foregoing changes as they appear on C-10 are listed below:

SWITCHING FROM ONE AFFILIATED EXHIBITOR TO ANOTHER AFFILIATED EXHIBITOR.

City	*Previous Account*	*Present Account*	*Change*
Chicago	RKO	B & K (Paramount)	1934-5
Houston	RKO	Interstate	1933-4
Syracuse	RKO	Loew's	1934-5

SWITCHING FROM AFFILIATED EXHIBITOR TO AN INDEPENDENT EXHIBITOR.

City	*Previous Account (Affiliate)*	*Present Account (Independent)*	*Change*
Akron	RKO	Chatkin & Feld	1933-4
Duluth	Paramount	S. J. Blackmore	1932-3
Erie, Pa.	Fox	Weschler	1934-5
Long Beach	Warner	Milton Arthur	1933-4
Miami	Par.	Wometco about	1929

City	Previous Account (*Affiliate*)	Present Account (*Independent*)	Change
Oakland, Cal.	Fox	Blumenfeld	1935-6
Okla. City	Par.	Louis Dent	1936-7
Pittsburgh	Warner	J. Harris	1935-6
Sacramento	Fox	Blumenfeld	1935-6
Seattle	RKO	Von Herberg	1932-3
San Diego	Fox	Metzger	1934-5
San Francisco	RKO	Milton Arthur	1935-6

Here, as Ex. C-10 indicates, Columbia has sold away (changed accounts) from the affiliate to the independent in 12 out of these 92 cities *and has never come back to the affiliates.*

73 Cities

While the Government itself prepared a chart of the 92 cities (Gov. Ex. 428) it went behind those cities and reduced the number to 73, claiming that these 73 cities showed a complete monopoly of exhibition by the Major defendants.

In paragraph 165 of the Amended and Supplemental Complaint the 73 cities are set out in detail, together with a column which purports to enumerate the various individual Major defendants who have a monopoly in the respective cities (R. pp. 3194-5).*

In this smaller group of 73 large cities Columbia licenses its pictures on first run to independents in the following 22 cities (Ex. C-6):

* At first glance, this schedule would seem to indicate 92 cities. But what the government did was to eliminate from the chart (Gov. Ex. 428) those 19 cities which the government did not consider a complete monopoly; so that the list shown in Paragraph 165 of the Amended and Supplemental Complaint is, by actual count, only 73.

New York	Youngstown
San Francisco	Hartford
Buffalo	Long Beach, Calif.
Seattle	Springfield, Mass.
Atlanta	Norfolk
Oakland, Calif.	Erie
Birmingham, Ala.	Reading
Oklahoma City	Sacramento
San Diego	Duluth
Richmond	Pittsburgh
Miami	Utica

In this supposedly sacred circle of monopolized cities, Columbia sells its product to independents in 30% of the cities.

413 Cities

These are the cities of 25,000 inhabitants and over. (They, of course, include the 92 cities and the 73 cities above mentioned, as well.) Exhibit C-6, specifies each and every first run account which it has had in these cities from the seasons 1936-1937 down to and including 1944-1945. In conjunction with this exhibit we should like the Court to examine Exhibit C-8 (a colored chart), which specifies the number of cities in which Columbia sold to the independents and those in which it sold to the affiliates. Below is a summary of what these charts illustrate:

Season	*Independents*	*Affiliated*
1936-37	177	207
1937-38	177½	212½
1938-39	171½	216½
1939-40	172½	218½

Season	*Independents*	*Affiliated*
1940-41	171½	221½
1941-42	172	222
1942-43	171	221
1943-44	166½	226½
1944-45	167½	226½

(The fraction indicates a split of the product.)

The percentage of independent accounts sold by Columbia in these cities is approximately *42%*.

The true significance of the number of independent accounts which Columbia has in these cities can best be understood in connection with an examination of Government's Exhibit 432 which is an analysis of how the product of all of the defendants is licensed on first run in each city with a population between 25,000 and 100,000. (In other words, in getting up the analysis the Government ignored the 92 cities which it had already dealt with in Government's Exhibit 428, and confined itself to the remaining cities in the 413 group.) This exhibit specifies first, those cities in which all of the pictures are licensed first run to independent theatres; secondly, the cities in which all of the pictures are licensed first run to affiliated theatres; and thirdly, the cities in which the product is licensed first run to both independent and affiliated theatres. It is important to examine those situations in which some product is licensed first run to independent theatres and other product is licensed first run to affiliated theatres. These may be deemed the *competitive* first run situations.

A computation of this Government Exhibit 432 shows that the total number of towns listed is 321, and that there

are within this group 92 competitive situations. This figure 92 has nothing to do with the chart of 92 cities in Gov. Ex. 428). The Government has entered information regarding Columbia on 87 of these competitive situations, showing that Columbia licenses its pictures to independents in 52 of these 87 competitive situations; and in the remaining 35 competitive situations to affiliates. Thus Columbia licenses to independent exhibitors in approximately 60% of these competitive cities in the 25,000 to 100,000 group.

On an overall basis the foregoing Exhibit 432 shows that in all of the 413 cities with populations of 25,000 or over, Columbia, out of a total of 137 competitive situations sells to the independent in 82, or approximately *65%*.

Montague explained his reason for doing this (R. p. 1292):

> "Q. What is your general custom and practice throughout the country in respect to these affiliates and independents? Whom do you prefer to sell and to whom do you sell most of your pictures to? A. We prefer to sell the accounts that we think we can get the most out of for our overall program.
>
> Q. Who are these accounts? A. In many situations they are the independent; in others they are the affiliates."

And again (R. p. 1363):

> "A. We have a definite policy that at no time do we negotiate with two people. We find it absolutely necessary to have a continuity of releasing in a definite theatre, wherever we can possibly get it. That is not only for the benefit of Columbia but for the benefit of subsequent runs in that situation.

They too are interested in where you play your picture first-run. And what we have practiced over a period of years, and our records prove beyond a question of a doubt—and it is what we like, is to continue to play with the same accounts that we have played with over a period of years, if those accounts have been satisfactory to us. If they are responsible, and their responsibility has stood up over a period of years, we think that is good enough to go along with.

"Your Honors, in many cases we play in houses where we know we could get more money from an opposition, but because we have been playing in that house for a number of years, and we have sturdy friendship, we feel it is best to continue there, but we don't feel we have lost by that—maybe we do get a little less on a picture or two, but over all our program we feel that is much the better policy. And we change our accounts—so few accounts are changed, I would say, rather, in a period of years, it is hardly noticeable on our records, and our records will support that beyond a question of a doubt."

The proof is thus overwhelming and uncontradicted that Columbia had built up a good-will, particularly with independent exhibitors.

Since the Government at no time charged that Columbia was in conspiracy with any of the independent exhibitors, it cannot be argued that its good-will was built up on a conspiracy. But this company, owning no theatres and relying upon its satisfied exhibitor-customers, is told by the Decree that it must throw these old customers overboard and thus give up all the good-will established in twenty-seven years of business (Decree, R. p. 3697).

"(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, *old customers* or otherwise."

The Good Will of Appellants' Business is a Valuable Property Right.

"There never was a time, in all likelihood, when good-will (which is only another name for favorable reputation, credit, honesty, fair name, reliability) has played a more important part in commercial life than it plays today. There never was a time when a good name was more to be desired, for purely business reasons, regardless of any other consideration, than today. There never was a time when the means and instruments designed for the creation of a good name for one's self were so highly developed as today. There never was a time when there were so many effective means available to the trade pirate to aid him to purloin the good-will of others to his own profit."

Nims on Unfair Competition (4th Ed. 1947), page 73, *et seq.* and cases cited.

"The relations of a dealer to his customers and to the trade generally is called good will, and is property which the law is bound to protect."

Albro J. Newton Co. v. *Erickson*, 126 N. Y. Supp., 950, 951.

"Men will pay for any privilege that gives reasonable expectancy of preference in the race of competition."

Cardozo J., *Matter of Brown*, 242 N. Y. 1, 6.

"Good will is property recognized and protected by law as such."

38 C. J. S. 950.

See also: *Societe Vinicole De Champagne* v. *Mumm*, 10 Fed. Supp., 289, 294; *Metropolitan Bank* v. *St. Louis Dispatch*, 149 U. S. 436, 446; *Red Wing Malting Co.* v. *Willcuts*, 15 Fed. (2d) 626, 629.

The Exemptions Granted to Appellants' Competitors

While purporting to regulate the licensing of pictures by means of competitive bidding (auction block) the Decree nevertheless provides in Section IV (R. p. 3700) as follows:

> "Nothing contained in this Decree shall be construed to limit, in any way whatsoever, the right of each distributor-defendant to license, or in any way to arrange or provide for, the exhibition of any or all the motion pictures which it may at any time distribute, in such manner, and upon such terms, and subject to such conditions as may be satisfactory to it, in any theatre in which such distributor-defendant has or may acquire pursuant to the terms of this Decree, a proprietary interest of ninety-five per cent or more either directly or through subsidiaries."

This simply means that a Major defendant may license its own pictures to its own theatres without any restrictions as to competitive bidding, and upon any terms it sees fit.

Let us see what that signifies. The affiliated theatres have access to the pictures of at least one distributor for each season. They have a definite source of supply. They do not have to scramble for pictures like the independent exhibitor. This leaves them in a powerful bargaining position for the balance of their product, and makes it difficult if not impossible for the independent theatres to compete with them for the better pictures.

It is obvious that the affiliated is in a position to take away from his independent competitor the cream of the good pictures of all the distributors, and leave the latter with the poorer product only available for his screen.

Columbia, unable to sell its better pictures to the independent because of this unfair competition, may only offer the independent its poorer pictures, which means that it destroys its good will and gradually loses its old independent customers. The result of this whole arrangement is discriminatory against both the independent exhibitors and Columbia, and works only to the advantage of the affiliated exhibitor and the five Major defendants.

At the same time appellants, who own no theatres and have no ready-made outlet, must compete with the five Major defendants for playing time. In that competition they are restrained by Section IV, as approximately three thousand of the best theatres are made independent of appellants' entire product, and need bid only for appellants' outstanding pictures (which they can do successfully as shown in the preceding paragraph) and appellants are forced to license the bulk of their product to independent theatres, still competing in that limited field with the pictures of the five Majors.

Moreover what is to prevent exhibitors in any competitive area from agreeing among themselves as to how high they will bid. Human nature being what it is, such things as collusive bidding have been known to happen. This Decree invites it. Must appellants, investing their capital in this hazardous enterprise, be left to the tender mercies of the exhibitors under a system by which the exhibitors *alone* fix the price of the commodity?

Far from opening up competition this Decree suppresses it, and restrains trade and commerce far worse than any of the contracts and practices which it enjoins.

POINT III

The injunction against block booking and the provisions for placing appellants' pictures upon the auction block destroy appellants' exclusive rights in their copyrights and violate a basic public policy.

[Assignment of Errors 4.]

1. Appellants have a monopoly in their copyrights which is given to them by the Constitution of the United States and by the Copyright Act. The Constitution provides in Article 1, Section 8:

> "The Congress shall have power: * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries."

The consolidated Copyright Act of 1909 (U. S. C. Title 17) provides (Section 1):

> "Any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right: * * *"

"Copyright in any form, whether statutory or at common-law, is a monopoly; * * *" Learned Hand, C. J. in *RCA Mfg. Co. Inc.* v. *Whiteman*, 114 Fed. (2) 86, 88. But it is a monopoly which is not condemned by law.

> "The patent laws and the Sherman Act exist side by side, each being entitled to full recognition and application by the courts."

Stephens, J. in *U. S.* v. *U. S. Gypsum Co.*, 67 Fed. Supp. 397, 426.

For the monopoly recognized by the patent law is not the monopoly condemned by the Sherman Act.

U. S. v. *Motion Picture Patents Co.*, 225 Fed. 800; *U. S.* v. *U. S. Gypsum Co., supra.*

Copyrighted works have all the benefits and incidents of personal property.

Defendants have the right, in licensing their copyrighted product, to impose any terms they see fit. That right is one of the incidents of ownership of property, including literary property.

In Morgan on Literature (1875) the author says (Vol. II, p. 624):

> "Literary property can only be a source of profit to its author, *according to his power of parting with it,* either in whole or in part, for value, and of specifying the uses for which it is so alienated; and these rights the ownership of literary property, as of all other, involves. We have seen that in the eye of the law such property, either before or after copyright, is personal property, and subject to all the rules of personal property as to its alienation, transfer, and descent. In general, therefore, all contracts relating to such alienation or transfer will be governed by the familiar principles of the law of contracts. * * *" (Italics ours.)

Davis v. *Vories*, 141 Missouri 234, was an action on some promissory notes, the consideration for which was a contract with respect to the copyright in a published book. In discussing the extent and validity of that contract the Court considered the unlimited extent and manner in which the owner of the copyrighted book could confer a license. It said (p. 239):

> "Copyright in the United States is the 'exclusive right of printing or otherwise multiplying copies of a published literary work, and publishing and vending the same, with the right of preventing all others from doing so.' 4 Am. and Eng. Ency. of Law, 147; R. S. U. S., sec. 4952. It is not disputed that Root was the owner of the copyright of the book in question. As such owner he had the exclusive right to sell his book *in any manner anywhere* in the United States. This right he could transfer to another, as to the whole or any particular part of the country. As was said by Clifford, J., in *Parton* v. *Prang*, 3 Cliff. 537: 'Sales may be absolute or conditional, *and they may be with or without qualification, limitation and restriction*, and the rules of law applicable in such case to other personal property must be applied in determining the real character of a sale of literary property.' The right was a valuable one, specially protected by the law of the land. R. S. U. S., sec. 4964. * * *
>
> "That the legal title to the copyright remains in the owner, and the instrument whereby he conveys a beneficial use therein is nothing more than a license, detracts nothing from the title or value of the beneficial interest conveyed. As was said in *Black* v. *Henry G. Allen Co.*, 42 Fed. Rep. 618, by Shipman, J.: 'Under section 4964, a license in writing, by instrument duly witnessed, may be given by the pro-

prietor to any other person to the extent described in such license; *and there is no restriction upon the power of the proprietor to assign or transfer in equity an exclusive right to use the copyrighted book in a particular manner or for particular purposes upon such terms and conditions as may be agreed upon.*" (Italics ours.)

In *Buck* v. *Hillsgrove Country Club, Inc.*, 17 Fed. Supp. 643 the District Court stated (p. 645):

"It is clear that the rights under the copyright laws are exclusive. To permit this paragraph in respondent's answer to exercise its force and effect is to destroy the exclusiveness given by the Constitution and the laws thereunder to the petitioners' copyright.

"In the case entitled Fox Film Corp. v. Doyal, 286 U. S. 123, 52 S. Ct. 546, 547, 76 L. Ed. 1010, it is held that:

" 'The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. * * * A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.' * * *

" 'Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants and not from any direct interest which the government has in

the use of the property which is the subject of the grants.'

"In Dr. Miles Medical Co. v. Platt (C. C.) 142 F. 606, 610, the court said:

" 'The right of a patentee, owner of a copyright, or owner of a secret process is merely the right of exclusion or debarment. The holder of such a property right, as said by the court in the Victor Talking Machine case [(C. C. A.) 123 F. 424], above cited, is a czar in his own domain. He may sell or not, as he chooses. He may fix such prices as he pleases. He may sell at one price to one person, and another to another person. He is not required to give reasons or deal fairly with purchasers.' "

In *Buck* v. *Gibbs*, 34 Fed. Supp. 510, modified on other grounds, 313 U. S. 387, Circuit Judge Hutcheson practically said the same (p. 517):

"A copyright owner has a right to sell or withhold from sale the matter of and the rights under the copyright. He cannot be made to sell his product unless he wishes to. He can make one price to one user and an entirely different price to another."

In *Buck* v. *Swanson*, 33 Fed. Supp. 377 (reversed on other grounds, 313 U. S. 406), the Court stated (p. 387):

"The owner of the copyright has the right to dispose of it on such terms as he may see fit, or he may decline to dispose of it on any terms."

It must be borne in mind that appellants are not selling their copyrights; they are merely licensing them for short periods.

The Copyright Act directly protects appellants in the *story* as it appears on the film, and the owner has all the nine exclusive rights given by Section 1 including the right of public performance [Sec. 1(d)]; the licenses issued by appellants to exhibitors are confined merely to that right of public performance. Obviously, all the other exclusive rights given to appellants under Section 1 (such as the right to multiply copies, vend, translate, adapt, etc., etc.) are retained by appellants; and since the one right to publicly perform is granted for a short period, this amounts to a license merely (*Widenski* v. *Shapiro, Bernstein & Co., Inc.*, 147 Fed. [2] 909; *Waterman* v. *Mackenzie*, 138 U. S. 252, 255).

Of course there is a vast difference between a license and a sale. "* * * a license is only a personal permission to the grantee to infringe the grantor's right" (*MacGillivray, The Law of Copyright*, p. 81) equivalent to a bare covenant not to sue (*Heap* v. *Hartley* (1889), 42 Ch. Div. 461, 470) and is "merely the grant of a privilege which protects the licensee against a claim for infringement" (*Ball, Law of Copyright and Literary Property* (1944), 530); "a dispensation or licence properly passes no interest (*Copinger, The Law of Copyright*, 7th Ed. p. 107); and is nothing more than "a mere exemption from suit" (*Moto Meter Co. Inc.* v. *National Gauge & Equipment Co.*, 31 Fed. (2) 994, 996); or "leave to do a thing which the licensor would otherwise have a right to prevent" (*Western Elec. Co.* v. *Pacent Reproducer Corp.*, 42 Fed. (2) 116, 118).

There is no provision in appellants' license agreements which requires the licensee to use the physical film in any particular manner. He may put it on any projec-

tion machine that he has available; he is not limited to any particular make of machine; he may employ any one or more projectionists of his own choice; he may run the film as often as he pleases within the term of his license period; in fact he is free to do anything with that film which will enable him to project the successive scenes upon his theatre screen. While it is true that a copyright owner in contradistinction to a patent owner, may not restrict the use of his work (*Bauer* v. *O'Donnell*, 229 U. S. 1), there is no proof in this record that appellants ever attempted or threatened to restrict the *use* of their physical copyrighted films.

Section 41 of the Copyright Act (17 U. S. C.) makes a distinction between the physical work itself and the subject matter of the copyright.

If appellants had *sold* the films and then made an attempt to control the use of the physical films in some way they would have gone far beyond their copyrights just as the copyright owners did in *Bobbs-Merrill Co.* v. *Strauss*, 210 U. S. 339 and in *Strauss* v. *American Pub. Ass'n*, 231 U. S. 222, where it was sought to control the price of books *after* they had been sold and had passed out of the hands of the copyright owners, and the statutory right to vend had been exhausted.

Consequently, licensing and not selling, appellants may license their works to licensees of their own choice and upon their own terms. That right has been taken away from them.

2. Moreover there is a public policy involved here.

Basically and fundamentally, copyright is given for the primary benefit of the public at large. The incidental

protection given to the author is merely the *inducement* by which that objective is attained. Chief Justice Marshall pointed that out in *Grant* v. *Raymond*, 6 Peters 218, where he said (p. 243):

> "The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensations made to those individuals for the time and labour devoted to these discoveries, by the exclusive right to make, use and sell, the things discovered for a limited time."

And only recently, the late Chief Justice Stone re-stated that doctrine with approval in *Scott Paper Co.* v. *Mercalus Mfg. Co.*, 326 U. S. 249.

In dealing with copyrights and patents the Courts make a marked distinction between the wide powers of the owners to *license* their works, and the limits imposed upon them when they come to *sell* their works.

In *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7) [cert. granted 207 U. S. 589; Cert. den. by stipulation 210 U. S. 439], a licensee under certain patents who had been limited by his contract as to the price of the article, defended a suit for the license fee, alleging violation of the Sherman Act by the patent owners, the licensors. The Court reversed a judgment for the defendant in an opinion by Circuit Judge Baker and a concurring opinion by Circuit Judge Grosscup. Judge Baker said (p. 361):

> "Under its constitutional right to legislate for the promotion of the useful arts, Congress passed

the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substanial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret till the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people through their representatives say to the inventor: Deed us your property, possession to be yielded at the end of 17 years, *and in the meantime we will protect you absolutely in the right to exclude everyone from making, using, or vending the thing patented, without your permission* (citing cases). *Congress, put no limitations, excepting time, upon the monopoly. Courts can create none without legislating.* The monopoly is of the invention, the mental concept as distinguished from the materials that are brought together to give it a body. Use of the *materials* as noted above, may be enjoined as injurious to the public; but that does not invade the monopoly. *Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts, no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them,* provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson. * * *" (Italics ours.)

Circuit Judge Sparks said in *Mid-Continent Investment Company* v. *Mercoid Corporation* (133 Fed. [2] 803, 810):

"Congress by authority of our Constitution, has pledged the public faith to each patent owner to exclude others from practicing his invention for a

limited time, and the anti-trust laws do not forbid contracts between the owners of patents and their licensees which are legitimate and within the scope of the patent. Bement v. National Harrow Co., 186 U. S. 70, 22 S. Ct. 747, 46 L. Ed. 1058."

And in *U. S. v. Vehicular Parking*, 54 Fed. Supp., 828, the Court pointed out that the restraints of trade arise from the *combination* of patent owners and not from the exercise of the right granted by the patent to exclude others (p. 837).

See also:

U. S. v. General Elec. Co., 272 U. S. 476.

The Decree therefore, takes away from appellants their exclusive rights in their copyrights, prevents them from licensing their works to licensees of their own choice singly or in combination with other copyrighted works, compels them to accept license fees fixed by the users, and in many respects destroys and nullifies the monopoly of appellants' copyrights.

It thereby **discourages** the creation and publication of copyrighted works, and thus violates a settled public policy that goes back to Colonial days.

The Provisions of Paragraphs 8 and 9 of Section II of the Decree Amount to a Species of Compulsory License.

The Copyright Act of 1909 has a compulsory license feature in Section 1-e with respect to the manufacture of phonograph records. That was a compromise provision put in by reason of the fact that in 1908 this Court had decided in *White-Smith Music Pub. Co.* v. *Appollo Company*, 209 U. S. 1, that a piano-roll or other mechanical

record was not a writing and therefore its unauthorized manufacture and sale did not infringe the copyright. In order to give authors some relief and yet encourage the industry to manufacture piano rolls and phonograph records, it was provided in Section 1-e of the Act of 1909 that if the owner licensed one recording company to make a mechanical reproduction of his musical composition, any other mechanical company had an equal right to do so upon the payment of a two cent royalty. By this method no one company may build up a monopoly of records.

Standard Music Roll Company v. *F. A. Mills, Inc.*, 241 Fed. 360, 363.

There is no other compulsory license provision in the Copyright Act, and none whatever in the Patent Statutes.

This Court pointed out in *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, at pp. 412-8, that certain provisions of the decree there involved should be modified. The Court held that a patent was protected against appropriation either by individuals or by the Government, and that in enjoining violations of the Sherman Act the Court refrained invariably from action which amounted to a forfeiture of the patents, (p. 415). It also analyzed the various attempts that had been made by Congress from 1877 down to adopt a system of compulsory licensing of patents, and it showed that Congress had never taken such action. It was our understanding of the Hartford-Empire case that the Court had rejected those provisions of the decree which provided for the compulsory licensing of defendants' patents free of royalties, although it did provide for a compulsory license upon reasonable royalties.

A provision for compulsory license upon payment of reasonable royalties was again arrived at and upheld in the more recent case of *U. S.* v. *National Lead Company*, 332 U. S. 319. There the Court seemed to base its decision largely upon the rule that in patent infringement suits the Court frequently grants the patent owner damage by way of an established or reasonable royalty. While that rule is true in a patent case, it has never been applied to a copyright case, for the simple reason that the provisions of the patent statutes governing damages provide only for actual damage or an account of profits, whereas the copyright statutes provide for actual damage, an account of profits and also for *statutory* damage. Giving a successful plaintiff a reasonable royalty in a patent infringement suit is simply a device to give him something where he is unable to prove either damages or profits. That distinction has been clearly recognized and commented on, particularly in the case of *Widenski* v. *Shapiro, Bernstein & Company, Inc.*, 147 Fed. (2d) 909, where Judge Woodbury said (p. 911):

> "It is indicated in the case last cited and established in *Enterprise Mfg. Co.* v. *Shakespeare Co.*, 141 F. (2d) 916, 919, and the cases cited therein, that proof of either established or reasonable royalties may be resorted to in patent cases only when the patentee is unable to make satisfactory proof of his actual damage and the actual profits of the infringer. That is to say, a plaintiff in a patent case, if he prevails on the issue of infringement, may recover upon the basis of an established or reasonable royalty only after he has failed to prove satisfactorily his own loss and the infringer's profits. Thus the royalty rule provides successful plaintiffs in patent suits who have been harmed but cannot

prove either their actual damages or the defendant's actual profits with a means to escape the hollow victory of an award of purely nominal damages. But the Copyright Act itself makes provisions for similiarly situated plaintiffs in copyright cases in the 'in lieu' clause of § 25 (b), a provision not found in the corresponding section of the Patent Law, (35 U. S. C. A. § 70) and from this we conclude that is a substitute for the established or reasonable royalty rule applied in patent cases."

Since there is no rule of damages by way of reasonable royalty in a copyright infringement suit, the basis for compulsory licensing which existed in the *National Lead* case does not exist in respect of a Sherman anti-trust suit affecting copyrights.

Consequently there is no basis for a compulsory license of appellant's copyrights, whether such license is to be upon the price offered by the highest bidder or any other price.

In that respect the Decree likewise violates appellants' exclusive rights in their copyrights, both in those existing, and those that will be acquired in the future.

The Decree makes no distinction between copyrights that existed up to the time of the trial and copyrights that would be created or acquired in the future.

Even the *Hartford-Empire* case and the *National Lead* case confined themselves solely to patents which were in existence at the time of the suit and which were the subject of the suit. The Court did not attempt to impose a reasonable license fee upon patents which might be obtained in the future. This Decree does that very thing.

In short, the Decree penalizes appellants in property which they would acquire in the future for acts committed in the past. It is the severest form of penalty conceivable, and so far as we know has never been invoked before.

The Decree Violates the Fifth Amendment of the Federal Constitution in That it Deprives Appellants of Their Property Without Due Process of Law. This Property Consists of Copyrights and Good-will.

In Curtis on Copyright, the author says (p. 5):

> "In the second place, all property possesses two uses, or qualities. First, it implies the right of possession and use, which constitutes a part of the ownership, or appropriation of the individual. This right of possession and use is full and exclusive. The object may be enjoyed by the individual in any mode consistent with the general welfare; a limitation which does not arise from any inherent defect in the right itself, but is imposed upon it from without. Secondly, property implies the faculty of transmission, by exchange, or sale, or gift. Transmission, is unrestrained, carries with it the full and exclusive right of possession and use of the original owner, indefinitely, so that the object remains forever separated from a community of goods. But, as the original owner may grant the whole unrestricted right of possession and use, so it follows that he may grant a less right than he himself enjoyed, by restricting or qualifying the use. He may thus specify the uses for which he does or does not grant the possession, and may annex various conditions upon which the possession shall be held."

See also, *Parton* v. *Prang*, 18 Fed. Cas. #1873, at p. 1278.

To destroy appellants' right to license their literary property upon their own terms is to deprive them of the aforementioned incidence of ownership. As Drone said in his famous work on Copyright (p. 6):

> "The very meaning of the word 'property' in its legal sense is 'that which is peculiar or proper to any person; that which belongs exclusively to one.' The first meaning of the word from which it is derived—*proprius*—is 'one's own'."

And further on, the author (p. 13), says:

> "* * * The exclusive right of using and transferring property is a necessary consequence of the recognition of the right of property itself."

Pointing out that there should be no distinction in that right between literary property and other kinds of property, the author said as far back as 1879 (pp. 52-3):

> "The progress of legislation and jurisprudence is constantly uprooting bad laws. The light of to-day shows the mistakes of yesterday. The errors of to-day will be exposed by the enlightenment of to-morrow. Progress is fatal to wrong. Time alone will show whether the grand principles governing literary property so well expounded by Lord Mansfield and other great jurists will again prevail; whether the judgment proclaimed by the Court of King's Bench in 1769 will again be recognized as the true law; whether the truth will again become clear to all, as it was to Mr. Justice Thompson when he said, 'Every principle of justice, equity, morality, fitness, and sound policy, concurs in protecting the literary labors of men to the same extent that property acquired by manual labor is protected; and as it was

to Mr. Justice Baldwin when he maintained, that 'to place the proprietors of literary property on a worse footing in courts of equity than the owners of other property would not only be subversive of all principles of justice, but in direct repugnance to the spirit of the Constitution and laws.' But, until these things shall come to pass, an inviolable right will be denied to men of letters.''

Mr. Justice Roberts in his dissenting opinion in *Interstate Circuit* v. *U. S.*, 306 U. S. 208, said, at p. 236:

''* * * The exhibition of a photoplay, were it not for the copyright law, would amount to a public disclosure and the use of the material would thereafter be open to the public. All the Copyright Act does is to create a form of property in the literary or artistic production of the author or artist. The Act attaches to the product of his brain certain attributes of property. One of these is the right of exclusive use similar to that attaching to physical property; another is the right to sell the production with consequent exclusive enjoyment in the vendee; another is the right to license others to use the product as one might lease or bail real or personal property. The monopoly, so called, amounts to no more than the attachment to the work of an author or composer or producer of motion pictures of the same rights as in here in other property under the common law. Therefore, the standing of the distributor defendants toward their customers, as respects the productions proposed to be licensed, differs in no way from that of the owner of any other property toward those to whom he leases or licenses its use or sale.''

And at page 239:

''Once the property rights conferred by the Copyright law are recognized it must follow that the prin-

ciples governing the right to use, sell, or turn to account other forms of property are equally applicable here."

We believe that in that respect the Court did not differ with Mr. Justice Roberts.

In *Buck* v. *Gibbs*, 34 Fed. Supp. 510 (modified on other grounds, 313 U. S. 387) Circuit Judge Hutcheson, referred to a statute which required copyright owners to furnish schedules giving the prices of the compositions so licensed and permitting anyone desiring to do so to perform any piece at the price so fixed. He said:

> "This is a taking of plaintiffs' property in its copyright without due process."

The instant Decree treats the appellants as if they were a public utility, indeed, a public utility in the interest of 18,000 motion picture exhibitors, that being the "public". We know of no decision which has ever held that the motion-picture business is affected with a public interest to the extent that gas, electricity or railroads are affected with such interest.

Even were Congress to attempt such a regulation of this business, it would be unconstitutional.

Not only do appellants suffer the loss of their copyright monopoly, but the Decree deprives them as well of their valuable good-will in violation of the Fifth Amendment.

The Decree has enjoined the furtherance of a conspiracy. Whatever may be said of their conduct heretofore, each of the defendants, including the appellants, is now bound un-

der penalty of contempt to act alone and not in unison with others. Acting in this way and not in combination, this Court had said (*Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312):

> "It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor. See *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85, 99; *Bobbs-Merrill Co.* v. *Straus*, 139 Fed. 155, 191."

So that in the instant case we have a taking of property which is not being used in the furtherance of a conspiracy, as was the case in *Interstate Circuit Inc.* v. *U. S.*, 306 U. S. 208 or in the *Binderup* case *supra*.

Those portions of the instant Decree which relate to "clearance" and "run" amply protect the exhibitors against any illegal action by appellants; exhibitors do not require paragraphs 7, 8 and 9 of Section II as a safeguard. Not only are those provisions illegal, but they are unnecessary.

CONCLUSION

The injunctive provisions against block-booking and the requirement for auction selling contained respectively in Paragraph 7 and Paragraphs 8 and 9 of Section II of the decree should be reversed and stricken from the decree.

Findings Nos. 1, 93, 94, 97, 154 and 156 and conclusions Nos. 8 and 11 should likewise be reversed and stricken for failure of proof and want of jurisdiction.

The decree should be modified in the above respects.

Respectfully submitted,

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